

**Reserved****Court No. 1****ARMED FORCES TRIBUNAL, REGIONAL BENCH,  
LUCKNOW****ORIGINAL APPLICATION No. 73 of 2016**Tuesday, this the 13<sup>th</sup> day of September, 2022**Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)  
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)**

Ex. No. 14361631N Gnr Hukum Chand, S/o Shri Thakur Prasad, Resident of village-Garhi Gurmani, Post Office-Biswar, District- Hathras.

**..... Applicant**Ld. Counsel for the Applicant : **Shri Pankaj Kumar Shukla,  
Advocate.**

Versus

1. Union of India, through Secretary Ministry of Defence, South Block, New Delhi.
2. Commandant, ARTY Centre, Nasik Road Camp, Maharashtra.
3. The Officer –in-Charge, ARTY Nasik Road Camp. (Maharashtra), Pin code-422102.
4. Commanding Officer, 200 Medium Regiment, C/o 56 APO.
5. Chief controller of Defence Accounts (Pensions), Draupadi Ghat, Allahabad.

**.....Respondents**Ld. Counsel for the Respondents. : **Dr. Shailendra Sharma Atal,  
Central Govt. Counsel**

## ORDER

**“Per Hon’ble Mr. Justice Umesh Chandra Srivastava, Member (J)”**

1. The instant Original Application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs :-

- A. *To set aside /quash the dismissal order dated 20.04.2007. Annexed as Annexure No. A-1 of this Original Application.*
- B. *To issue an order or directions to the respondents to issue all consequential benefits to the applicant.*
- C. *To issue / pass any other order or direction as this Hon’ble Tribunal may deem just fit and proper under the circumstances of the case in favour of the applicant against the respondents.*
- D. *To allow this original application with costs.*

2. Brief facts of the case are that the applicant was enrolled in the Army on 18.12.1981. After completion of training, applicant was posted to 200 Med Regt. In the year 1996, while posted at Arty Centre, Nasik Road Camp, applicant was living with his family. Son of the applicant met with an accident and he was treated in Military Hospital. Applicant also suffered from Tuberculosis (T.B.). He was granted leave but he could not join

duty in time. Applicant was dismissed from service w.e.f. 20.04.1999 under Section 20 (3) read with Army Rule 17. Applicant prayed for grant of service pension but the same was rejected. This O.A. has been filed by the applicant with the prayer to quash dismissal order dated 20.04.2007 and to grant all consequential benefits.

3. Learned counsel for the applicant submitted that after completion of training applicant was posted to 200 Medium Regt from 11.01.1983. On 15.05.1996, right hand of the applicant's son was broken due to falling while he was returning home from school. Son of the applicant was treated in Military Hospital. Applicant was granted leave. On expiry of leave applicant joined his duty on 05.05.1996. On 06.05.1996, he requested army authorities to grant him leave or to attach him to some army unit at Mathura to enable him to get his son admitted in Military Hospital, Mathura for treatment. Army Authorities ordered applicant to go to temporary duty to M&G Area at Bombay. Applicant instead of going to M&G Area at Bombay came back to his village and thereafter got his son admitted in Military Hospital Mathura for treatment. Applicant was bound to attend his ailing son at Mathura. Thus the applicant remained absent without leave for a long period. After recovery of his son, the

applicant rejoined his duties at Arty Centre Nasik Road voluntarily. He was punished and movement order was given to him for returning back to his parent unit with 6 days preparatory leave excluding Sunday/holidays. While on leave, applicant was not feeling well. On medical checkup it was revealed that he is suffering from Tuberculosis (T.B.). The applicant continued his treatment wef 20.11.1996 and he was declared fit by physician on 06.06.1999. He was informed by the army authorities vide letter dated 26.02.1999 that he has been declared deserter from 17.12.1996. The respondents informed wife of the applicant vide letter dated 04.06.1999 to ask her husband to join his unit immediately. The applicant joined his unit at Allahabad on 21.06.1999. He was directed to report to Centre. Applicant was dismissed from service w.e.f. 20.04.1999 under Section 20 (3) read with Army Rule 17. Learned counsel for the applicant pleaded that applicant was absent from duty due to illness of his son as well as his own illness. While discharging applicant, no proper procedure was followed and applicant was not provided discharge order. Applicant prayed for grant of service pension but the same was rejected. Learned counsel for the applicant pleaded that applicant was absent from duty due to illness of his son as well as his own illness and on recovery, he joined duty voluntarily. Applicant has completed 15 years of colour serviced

and he is entitled for service pension. He prayed that impugned order of dismissal be quashed and applicant be granted service pension. This O.A. has been filed by the applicant with the prayer to quash dismissal order dated 20.04.2007 and to grant him all consequential benefits.

4. On the other hand submission of learned counsel for the respondents is that applicant was attached with Arty Centre Nasik Road Camp wef 04.08.1993 to 16.11.1996. Applicant absented himself without leave from 03.05.1996 to 11.07.1996 and rejoined voluntarily on 11.06.1996 for which he was awarded 3 months rigorous imprisonment in military custody. The applicant filed WP No 22046 of 2000 before Hon'ble High Court of Judicature at Allahabad for grant of pensionary benefits. The case was dismissed with liberty to file it fresh. He was reverted back to his parent unit i.e. 200 Med Regt on 17.11.1996 along with 06 days preparatory leave excluding Sunday. During preparatory leave, the applicant had requested for one month of Advance of Annual Leave other than that of preparatory leave. But the same was not granted to him as no provision exists to grant advance of Annual Leave along with preparatory leave. Hence, applicant was granted 30 days Advance of Annual Leave only w.e.f. 17.11.1996 to 16.12.1996.

Applicant failed to rejoin duty on completion of leave and he remained overstayed leave w.e.f. 16.12.1996. In consequence thereof apprehension roll was issued vide letter dated 17.01.1997 to apprehend the individual but neither the applicant rejoined voluntarily nor he could be apprehended by the civil police. After 30 days of his absence, a Court of Inquiry was held in accordance with Army Act Section 106 and applicant was declared deserter. Being deserter from Field Area, after 10 years, applicant was dismissed from service w.e.f. 20.04.2007 under the provisions of Army Act Section 20 (3) read in conjunction with Para 22 of Army Order 43/2001/DV. He concluded that since applicant did not join his unit, he was rightly declared a deserter by following due process. There is no provision to grant pensionary benefits to an individual who has been dismissed from service under Army Act. He pleaded for dismissal of O.A.

5. We have heard learned counsel for the parties and perused the material placed on record.

6. The question before us to decide is “whether the applicant having 15 years of colour service is entitled for grant of service pension on being declared deserter”?

7. Before advertent to rival submissions of learned counsel of both sides, it is pertinent to mention that judgments relied upon by the applicant are not relevant in the present case being based on different facts and circumstances.

8. Admittedly, the applicant overstayed leave and did not report to unit thereafter. An apprehension roll was issued and after 30 days of absence, a Court of Inquiry was held under Section 106 of the Army Act, 1950 and he was declared a deserter. Submission of applicant that he could not join duty as his son and he himself were ill, seem to be untrue. Applicant would have reported his unit and he would have taken medicine from Military Hospital.

9. From the aforesaid an inference may be drawn that applicant intended not to join duty. Therefore, in absence of any reliable explanation for absence, the only conclusion is that applicant deserted the service intentionally. We have perused the letter written by respondents to wife of applicant and we find that applicant was not willing to join duty.

10. In the instant case, applicant is not entitled to pensionary benefits as per para 41 (a) of Pension Regulations for the Army, 2008 (Part-I) is sustainable as it provides that an

individual who is dismissed from service under the provisions of Army Act, is ineligible for pension or gratuity in respect of all previous service. For convenience sake, aforesaid para 41 (a) is reproduced as under:-

*“41 (a). An individual who is dismissed under the provisions of Army Act, 1950 or removed under the Rules made thereunder as a measure of penalty, will be ineligible for pension or gratuity in respect of all previous service. In exceptional case, however, the competent authority on submission of an appeal to that effect may at its discretion sanction pension/gratuity or both at a rate not exceeding that which would be otherwise admissible had he been retired/discharged on the same date in the normal manner.”*

11. In the case reported in (1986) 2 SCC 217, **Capt Virender Singh vs. Chief of the Army Staff**, the Hon'ble Apex Court has held as under:-

*“[Sections 38 and 39](#), and [Sections 104 and 105](#) make a clear distinction between 'desertion' and 'absence without leave', and [Section 106](#) prescribes the procedure to be followed when a person absent without leave is to be deemed to be deserter. Clearly every absence without leave is not treated as desertion but absence without leave may be deemed to be desertion if the procedure prescribed by [Section 106](#) is followed. Since every desertion necessarily implies absence without leave the distinction between desertion and absence without leave must necessarily depend on the animus. If there is animus deserendi the absence is straightaway desertion.*

13. As we mentioned earlier neither the expression 'deserter' nor the expression 'desertion' is defined in the [Army Act](#). However we find paragraph 418 of the Artillery Records Instructions, 1981 refers to the



*distinction between desertion and absence without leave. It says:*

*418. A person is guilty of the offence of absence without leave when he is voluntarily absent without authority from the place where he knows, or ought to know, that his duty requires him to be. If, when he so absented himself, he intended either to quit the service altogether or to avoid some particular duty for which he would be required, he is guilty of desertion. Therefore, the distinction between desertion and absence without leave consists in the intention. (AO 159/72). When a soldier absents himself without due authority or deserts the service, it is imperative that prompt and correct action is taken to avoid complications at a later stage.*

*We also find the following notes appended to the [Section 38](#) of the Army Act in the Manual of the Armed Forces:*

*2. Sub Section (1)-Desertion is distinguished from absence without leave under AA. [Section 39](#), in that desertion or attempt to desert the service implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire piquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.*

*3. A person may be a deserter although here-enrolls himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).*

*4. Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence e.g., apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under AA. [Section 106](#) is not by*

*itself a deciding factor if other evidence suggests the contrary.*

*In Black's Law Dictionary the meaning of the expression 'desertion' in Military Law is stated as follows:*

*Any member of the armed forces who-(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion. Code of Military Justice, 10 U.S.C.A. 885”.*

12. In another case of ***Shish Ram vs. Union of India & Ors***, (2012) 1 SCC, page 290, the appellant in that case was declared deserter with effect from 19.06.1978 and was dismissed from service with effect from 20.10.1981 i.e. after expiry of three years. The appellant challenged his dismissal order, however, no infirmity in the said order was found by the Hon'ble Apex Court and dismissal order was confirmed.

13. Keeping in view the aforesaid legal position when we examine the facts and circumstances of the instant case, it is clear that the defence of the applicant, that he was undergoing prolonged treatment in civil hospital for illness, is absolutely without substance. If applicant was a case of illness, his relatives could have brought him to a nearby military hospital

for treatment rather than going to civil hospital. Medical fitness certificate issued by civil hospital is not acceptable in these circumstances. The applicant was a deserter and did not report to any authority after 17.12.1996. This itself shows that the applicant had no intention to return to his unit. Admittedly, after unauthorised absence of the applicant, a Court of Inquiry was held and he was declared a deserter from the date of his absence i.e. 17.12.1996.

14. Thus, keeping in view of the aforementioned situation when we examine the facts and circumstances of the instant case, it is clear that applicant was intimated that he should rejoin duty. The applicant was declared a deserter by the duly constituted Court of Inquiry and he did not report to any authority after expiry of leave granted to him. No lenient view may be taken where misconduct relates to Armed Forces personnel. Any leniency shown to such a recalcitrant soldier would lead to indiscipline and demoralizing the Force in which discipline and adherence to duty is inviolable. Soldiers are expected to be disciplined not only in their official life but also in personal life. Country reposes faith in the members of the Armed Forces to be honest and fair in their lives while serving the Nation. Absence without sanction of leave is a serious misconduct and in some cases it may result

with ill consequences. No one knows when a flux of bullet will come from enemy side. In the Armed forces discipline cannot be overlooked in military matters especially overstaying leave and desertion.

15. Hence, we do not find any illegality or irregularity in declaring applicant a deserter and issuing dismissal order. The dismissal order does not suffer from any illegality. After ten years from the date of desertion, he was dismissed from service by following due process. Hence, we do not find any illegality or irregularity in the impugned order. We do not find any substance in the present O.A. which deserves to be dismissed. It is, accordingly **dismissed**.

16. No order as to costs.

17. Miscellaneous applications, pending if any, shall stand disposed off.

(Vice Admiral Abhay Raghunath Karve)  
**Member (A)**

(Justice Umesh Chandra Srivastava)  
**Member (J)**

Dated : 13 September, 2022

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